Petitioner further contends that he is restrained of his liberty and confined to the State Penitentiary of Texas as a result of a judgment and sentence imposed by the District Court of Howard County, Texas, in that he was not afforded any opportunity to have the assistance of counsel of his own choice.

Petitioner contends that the Texas Courts, in deciding this case, did not possess the correct understanding of the Fourteenth Amendment.

This decision of the Texas Court of last resort does not rest upon a state ground which independently and adequately supports the same.

The following cases are believed to sustain the Appellate jurisdiction of the Supreme Court of the United States:

Powell v. Alabama, 287 U.S. 45;
Brown v. Mississippi, 297 U.S. 278;
Johnson v. Zerbst, 304 U.S. 458;
Patton v. United States, 281 U.S. 276;
Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292.

Questions Presented

1. Whether Petitioner is deprived of his liberty without due process of law, contrary to the provisions of the Fourteenth Amendment where it is established that he was not afforded any opportunity to have the assistance of counsel of his own choice;
2. The Petitioner is deprived of his liberty without due process of law, contrary to the provisions of the Fourteenth Amendment where he did not waive his right to the assistance of counsel of his own choice, nor by any intelligent or intentional failure to request

postponement of his cause until said counsel of his own choice could be released from a trial in which he was then engaged in a distant city;

3. Where Petitioner refused to accept the services of a court-appointed attorney, but insisted upon the presence of counsel of his own choice;
4. Where Trial Court refused to grant court-appointed attorney ten days in which to prepare defenses in this cause, as provided by Texas statutory law.

Reasons For Allowance of The Writ

The right to the assistance of counsel of one's own choice is one of the most fundamental human rights protected under the Fourteenth Amendment of the Constitution of the United States. At least under certain circumstances this fundamental right is protected under the Fourteenth Amendment from violation in proceedings in State Courts. The conditions whereby this Petitioner was sentenced to seven years in the penitentiary of the State of Texas, presents circumstances so contrary to natural, inherent, and fundamental principles and fairness as to amount to a violation of due process of law under the Fourteenth Amendment. Nor was there any waiver of the right of assistance of counsel of Petitioner's choice by reason of the Petitioner having entered a plea, and there is no evidence or even suggestion in the record to show that there was any intelligent or intentional waiver of the right of Petitioner to the assistance of counsel of his own choice.

A further reason for granting this application is that the Petitioner was denied due process of law within the meaning of the Fourteenth Amendment in that his trial-court-appointed attorney was denied the ten-day period

in which to prepare defenses for Petitioner, in violation of Article 494, of the Code of Criminal Procedure, State of Texas.

The Right to Assistance of Counsel of Petitioner's Own Choice Is Protected By The Due Process Clause of The Fourteenth Amendment

The fundamental character of the right to assistance of Petitioner's choice of counsel in this criminal proceeding in a state court, as a right included in the conception of the due process clause of the Fourteenth Amendment was carefully analyzed in *Powell v. Alabama,* 287 U.S. 45, where this Court said, the opinion quoting in part from the decision in *Twining v. New Jersey,* 211 U.S. 78, 79:

> " 'It is possible that some of the personal rights safeguarded by the first eight amendments against national action might also be safeguarded against state action, because a denial of them would be a denial of due process of law. Chicago B. & Q. R. Co. v. Chicago, 166 U.S. 226, 41 L.Ed. 979. If this is so, it is not because those rights are enumerated in the first eight amendments, but because they are of such a nature that they are included in the conception of due process of law.' While the question has never been categorically determined by this Court, a consideration of the nature of the right and a review of the expressions of this and other Courts, make it clear that the right to the aid of counsel is of this fundamental character."

Brown v. Mississippi, 297 U.S. 278, in which this Court in reviewing a decision of the Supreme Court of the State of Mississippi affirming a conviction of crime considered

the limitations upon the regulation by a given state of the procedure of its courts resulting from the mandates of the "due process of law" clause of the Fourteenth Amendment. This court readily conceded that a state is free to regulate the procedure of its courts in accordance with its own conceptions of policy within certain limitations, it is pointed out in that case that the freedom of a state in formulating its policy is the freedom of constitutional government and is restricted by the requirement of due process of law. This Court, in its decision of that case, drew a distinction between matters which a state is free to formulate in accordance with its own ideas of policy and those rights and privileges which, in the language of this Court's opinion, "offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." As to the right of an accused to the assistance of counsel, and this applies to counsel of the accused's choice, it was said:

> "The state may not deny to the accused the aid of counsel."

This Court, in a series of uncompromising decisions, has held that certain of the rights protected against national action by the first eight amendments to the Constitution are equally protected against state action under the due process clause of the Fourteenth Amendment. The more fundamental and the more deep-rooted in traditions and principles of justice and liberty is the right, the more certain it is to be a right protected against state action by the due process clause of the Fourteenth Amendment. *Johnson v. Zerbst*, 304 U.S. 458, involved the right to the assistance of counsel under the Sixth Amendment to the

Constitution of the United States. The United States District Court in Georgia dismissed a petition for Writ of Habeas Corpus filed by one who had been convicted in Federal Court, emphasized the fundamental character of the right of such assistance, in the following terms:

> "It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional skill to protect himself when brought before a tribunal with power to take his life or liberty wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly and necessary to the lawyer - to the untrained layman - may appear intrinsic, complex and mysterious. Consistently with the wise policy of the Sixth Amendment and other parts of our fundamental charter this Court has pointed to '* * * the humane policy of the modern criminal law * * *' which now provides that a defendant '* * * if he be poor * * * may have counsel furnished him by the state * * * not infrequently * * * more able than the attorney for the state.'"

The deprivation of life or liberty is just as substantial and conclusive as well as real to the accused whether the death penalty is imposed by a state or federal court, or whether the accused is restrained in a state or federal penitentiary. It is the protection of that life and liberty in accordance with the traditionally recognized fundamental principles of justice which is accorded all persons by virtue of the due process clause of the Fourteenth Amendment. It is because the right to assistance of counsel of one's own choice has been traditionally recognized as one of the most fundamental of the human rights that the freedom exercised by a state in formulating its policy is necessarily restricted in this regard by the Constitutional guarantees of the Fourteenth Amendment.

Petitioner respectfully states that his conviction without the assistance of counsel of his own choosing deprived him of due process of law in defiance of the Fourteenth Amendment, particularly in view of the circumstances prevailing in this cause.

The Right to Assistance of Counsel of One's Own Choice — Under Texas Law

There is a suggestion in *Betts v. Brady*, 316 U.S. 455, that the Constitutional, Legislative and Judicial history of the various states constitutes a compelling source of the common understanding of those who resided under the Anglo-American system of law, as to the extent to which due process of law demands that the accused be furnished counsel. However, the provisions of the Constitution and Statutes of Texas relevant this issue, and the interpretation thereof by Texas Courts of last resort lend criterion of the extent to which Petitioner in this cause was denied due process of law. An appraisal of the circumstances in this cause suggests the special desirability of Petitioner having assistance of his own chosen counsel.

The Constitution of Texas provides in Article I, Section 19:

> "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land."

The Constitution of Texas provides in Article I, Section 10:

> "He * * * shall have the right of being heard by himself or counsel, or both * * *"

The Texas Court of Criminal Appeals, being a Court of last resort in criminal matters, has consistently recognized the right of one accused of crime to the appointment of counsel under the statutory provision above quoted, and to the exercise of an accused's right to have counsel of his own choice present to lend assistance in the defense of his case. In *Daughtery v. State*, 26 S.W. 60, the issue was presented in which the accused had employed a counsel, who became sick and was, therefore, unable to appear as an attorney two days before the trial date. Two other attorneys interceded in behalf of Daughtery and sought a continuance for him. Each of these lawyers talked to the accused and would have represented him, but for their conclusion that Daughtery was so mentally defective as to be unable to aid them in his defense, and, therefore, declined to appear as counsel for the accused.

The Trial Court did not appoint an attorney for the accused, as was done in the instant case, because he had no authority to do so unless Daughtery was declared an indigent person, which this Petitioner was not; hence, the appointment of Mr. Eyssen to represent this Petitioner was void and of no effect. Judge Hurt, in deciding the Daughtery case wrote:

> "The Bill of Rights provides that 'in all criminal cases the accused shall have the right of being heard by himself, or counsel, or both. The right thus secured is invaluable. The appearance of counsel in a criminal case to speak upon the law to the Court, upon the facts to the jury, to see that improper or illegal testimony is excluded, and to cross examine the witnesses, is not an idle ceremony; and the denial of this right ought to be cause for reversal, the accused not being at fault."

And in *Ex Parte Mays,* 212 S.W. 2d 164, the Texas Court of Appeals in a case similar to the case at bar, stated:

> "We think that, lacking an indigent person, the Court did not have the power to appoint an attorney for him, and therefore such an order was void."

The Mays case, supra, definitely forecloses any question that the Trial Court in Texas is without authority to appoint counsel for one who is not an indigent and for one who has previously engaged the services of another attorney, but who is unable to appear for his client because of attendance in another Court in a distant city.

Under the circumstances, Petitioner was without counsel inasmuch as he refused the services of the court-appointed attorney and insisted that he not be tried until the counsel of his own choice was released from the case in which he was engaged in New York City (M. 41-42). Thus, Petitioner was denied due process of law, since the circumstances existing in this cause are not unlike those set forth in a footnote in the case of *Quicksall v. People of State of Michigan,* 339 U.S. 660.

Again, in *Parham v. Texas,* 222 S.W. 561, the Court of Criminal Appeals of this State held that under the Constitution, as written in the State of Texas, the accused's right to have the benefit of his counsel, is a valuable right which the Courts must strictly enforce.

In view of these unqualified expressions of the right of Petitioner to the assistance of counsel of his own choosing, it is difficult to comprehend how this Petitioner can be said to have been accorded due process of law in line with fundamental principles of fairness and justice as commonly understood in the system of law under which justice is administered in Texas.

The Right to Assistance of Counsel of Petitioner's Own Choosing Was Not Waived By An Intelligent And Competent Waiver

The right to the assistance of counsel of his own choosing being a fundamental constitutional right, Courts should indulge every reasonable presumption against waiver of that right.

This Court, *in Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292, 307:

> "We do not presume acquiescence in the loss of fundamental rights."

Numerous other authorities may be cited to the same effect, such as *Patton v. United States*, 281 U.S. 276; *Dimick v. Schiedt*, 293 U.S. 474; *Slocum v. New York Life Ins. Co.*, 228 U.S. 364.

In this case there should not be any presumption that the right to assistance of counsel of Petitioner's own choice has been waived, because undisputed facts are that Mr. Golding was his attorney since September, 1960, and he was adamant in refusing assistance from the court-appointed attorney, which was made over his objection. The very existence of the right of an accused, who is not an indigent, to employ an attorney of his own choosing of necessity imposes a responsibility of all Courts that the accused, particularly this Petitioner, knows what he wants and is entitled to that wish under the Constitution of Texas and the due process clause of the Fourteenth Amendment. Since Petitioner did not voluntarily or otherwise waive his right to counsel of his own choosing, he was, under all

respectable authorities, deprived of a Constitutional right. As stated in *Glasser v. United States*, 315 U.S. 60:

> "The right to have the assistance of counsel is too fundamental and absolute to indulge in mere calculations as to the amount of prejudice arising from its denial."

To the same effect, see *Ex Parte, Richard Quirin*, 317 U.S. 1.

The record in this case is wholly lacking in any indication of any waiver with regard to the absence of Petitioner's hired counsel. Nor is there any syllable in this record to even suggest that Petitioner waived his right to have his own attorney assist him, and be present "with full knowledge of his rights and capacity to understand them."

In *Glasser v. United States*, 315 U.S. 60, the fundamental character of the right of assistance of one's counsel under the Sixth Amendment as a safeguard to human life and liberty is demonstrated by the settlement of the fundamental character of that right as protected in State Courts under the due process clause of the Fourteenth Amendment:

> "Even as we have held that the right to the assistance of counsel is so fundamental that the denial by a state court of a reasonable time to allow the selection of counsel of one's own choosing, and the failure of that court to make an effective appointment of counsel, may so offend our concept of the basic requirements of a fair hearing as to amount to a denial of due process of law contrary to the Fourteenth Amendment, Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527, so are we clear that the 'Assistance of Counsel' guaranteed by the Sixth Amendment contemplates that such assistance be un-

> trammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired." (315 U.S. 70)

Whether it be in a state court or in a federal court, to arbitrarily hold that a plea entered by an accused, such as this Petitioner, without the presence of his own employed attorney, waives the right to assistance of such employed attorney would make possible under the pretense of waiver the most extenuating violation of fundamental rights of human life or liberty which the Fourteenth Amendment protects.

Therefore, under the circumstances of this case, the denial of the trial court to postpone or continue this cause because of the absence of his employed attorney, who was engaged in the trial of a case in a distant city, not only constituted an abuse of judicial discretion, but resulted in depriving Petitioner of the fundamental right to assistance of his own attorney in a case in which Petitioner was most in need of the protection of his fundamental human rights.

Thus, in considering all of the facts in this cause, particularly as to whether or not Petitioner waived his inherent right to have his own counsel present by virtue of his having entered a plea, as established by *Johnson v. Zerbst*, *Walker v. Johnston* (312 U.S. 275) and *Glasser v. United States, supra,* it is significant that neither the Texas Court of Criminal Appeals, nor any other respectable authorities upon which Respondent relies, suggested any distinction between the right of an accused in a State Court to have counsel of his own choice present, as distinguished from a United States District Court.

Petitioner's contentions reveal a case that falls squarely within the ratio decendi of *Powell v. Alabama,* 287 U.S. 45, within the principles enunciated in *Johnson v. Zerbst,* 304 U.S. 548, and within the disposition made in the numerous cases cited herein. *Powell v. Alabama* and *Johnson v. Zerbst* are, in our view, indistinguishable. In Powell, nine negro boys were indicted and entered their pleas in an atmosphere of intense community excitement and with national guardsmen protecting the Courthouse. There, the Court appointed the whole bar of Jackson County to represent these boys, but no particular attorney undertook any responsibility for preparing a defense. The defendants were put to trial in three groups; all three trials were completed in a single day, and all but a thirteen-year-old boy were sentenced to death. Between the arraignment and the commencement of the trial itself, these defendants had no lawyer at all. They were given no opportunity to communicate with friends and relatives. On the morning of the trial the trial judge appointed a local lawyer and then promptly went ahead with the proceedings. The verdict of the trial court was sustained in the Supreme Court of Alabama, but was reversed in this Court, based upon the lack of effective aid of counsel.

In *Zerbst,* two enlisted men were charged with feloniously uttering, passing and possessing counterfeit federal reserve notes. In the preliminary hearing conducted by the United States Commissioner they were represented by counsel, and on January 21, 1935, they were indicted. Two days later they were arraigned and tried, and ultimately sentenced without counsel.

Writing for the Court, Mr. Justice Black quoted from *Powell v. Alabama,* 237 U.S. 45, 69, the statement of Mr.

Justice Sutherland that if a layman is "charged with crime he is incapable generally of determining for himself *whether the indictment is good or bad*. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare a defense even though he have a perfect one. He requires the guiding hand of counsel *at every step* in the proceedings against him."

In every significant respect the case at bar is not unlike the *Powell* and *Johnson* cases because each had no counsel at the trial of a serious (but not a capital) offense; who were lodged in a strange city where they had no acquaintances; who were never informed by the prosecutor or the Court that they were entitled without cost to have counsel appointed for them; and who did not competently waive the rights to assistance of counsel. Indeed, in many respects, the case at bar is a much stronger case for this Petitioner than was the *Powell* and *Johnson* cases: Here, petitioner specifically requested and was refused a continuance so that he could have at his trial an attorney of his own choice whom he had employed and retained some two months before the trial court put Petitioner to trial. In the *Powell* and *Johnson* cases, the accused, so far as the record shows, made no such request during the months that they were imprisoned and received no such refusal.

Here, Petitioner specifically objected to the appointment of an attorney by the Court one day before he was put to trial and insisted upon his right to confer with a particular lawyer whom he had previously retained and employed to try his case for him. In *Johnson*, Petitioner

actually conferred with counsel at the preliminary hearing before a United States Commissioner, but never again asked to confer with him or any other specific lawyer.

Here, Petitioner, through the court-appointed lawyer, specifically requested that he be given ten days from the date of such appointment in order to prepare his defenses in accordance with Article 494 of the *Code of Criminal Procedure, State of Texas.* In *Johnson,* Petitioner learned of the nature of his charge two months before he was arraigned.

Any attempt, as we conceive, to try to distinguish the case at bar from the *Powell case, the Johnson case,* and notably those cited in this petition, must necessarily fall because such attempts will not withstand the withering attack posed by such authorities. Any other conclusion would be shocking, particularly since the trial judge, the prosecutor, and the other officials in Howard County, Texas, had been put on notice long before this trial was set down for hearing that Bernard A. Golding had been retained and employed by Petitioner to represent him in this very case. (Tr. 4) The affidavit executed by Petitioner appearing on page 14 of the transcript, discloses that Mr. Golding was employed a day or two after Labor Day, 1960, as his sole counsel. These facts are uncontroverted. Further, the prosecutor in this case, via telephone, was advised by Hon. Richard H. Levet, United States District Judge, Southern District of New York, that Mr. Golding had been in the trial, and still was so engaged, in Judge Levet's Court, and would be so occupied for some time. (Tr. 11) In fact, on November 22, 1960, Judge Levet, as aforesaid, wrote a letter which was attached to Petitioner's first motion for a continuance, to the effect that:

" UNITED STATES DISTRICT COURT
UNITED STATES COURTHOUSE
NEW YORK 7, N.Y.

CHAMBERS OF
JUDGE RICHARD H. LEVET

November 22, 1961

TO WHOM IT MAY CONCERN:

Bernard A. Golding, Esq. is now engaged in a long and complex narcotic conspiracy trial in this court before the undersigned. He represents Benjamin Indiviglio, and undoubtedly will be held here for some time.

/s/ RICHARD H. LEVET
United States District Judge"

It is all too plain, is manifested in this record, that Petitioner was denied every requisite of due process of law in that he was refused the right to have present, counsel of his own choice at the trial, and was further denied the assistance of his employed attorney to aid Petitioner in scrutinizing the indictment and to aid Petitioner in every conceivable manner. It is here that Petitioner, having been denied the right to have counsel of his own choice present, was precluded from the assistance of effective counsel as enunciated in *Powell v. Alabama*, 287 U.S. 45, 71, where the Court stated that the duty of providing effective counsel "* * * is not discharged by the assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." Without doubt, that was the specific meaning and purpose of providing a period of ten days to a court-appointed attorney in order to properly prepare the case. (Article 494, *Code of Criminal Procedure, State of Texas*)

Conclusion

Respect for the Constitutional benefits extended to all, and in the interest of decent public morality, a Writ of Certiorari should issue to review the judgment of the Court of Criminal Appeals of Texas in this cause.

Respectfully submitted,

BERNARD A. GOLDING
Counsel for Petitioner
432 Niels Esperson Bldg.
Houston 2, Texas

This is to certify that a copy of this instrument has been served upon Will Wilson, Attorney General of the State of Texas, by depositing the same in a United States Mail Depository in the Niels Esperson Building, Houston, Texas, in an envelope properly addressed and with sufficient postage thereon.

Bernard A. Golding

APPENDIX "A"

V. A. Gomez, Appellant
No. 33, 045 v. Appeal from Howard County
The State of Texas, Appellee

Opinion

The offense is receiving from Leroy Wright and concealing stolen property; the punishment, seven years.

The testimony of the witness Wright shows that he was employed in the warehouse of the Saunders wholesale plumbing supply company in Big Spring; that appellant, whose wife owned a number of apartment houses, began coming to the warehouse to make purchases; that originally appellant made a personal loan of one hundred dollars to Wright, then when Wright was unable to repay the loan he suggested that appellant come to the warehouse and get some "merchandise" belonging to his employer in satisfaction of the debt. During the course of their relationship, Wright delivered to appellant's employee a certain hot water heater described in the indictment, and such heater was, by such employee at appellant's instruction installed in one of the properties under appellant's control, where it was later found by the officers.

Wright's testimony that appellant knew the property was stolen was corroborated by a number of facts. Checks made payable to Wright by appellant were introduced, together with obsolete form invoices made out to appellant for plumbing supplies and which were concealed by Wright at his home. It was shown that appellant never had an account with the Saunders Company; that Wright had been instructed not to sell to appellant; and that the books and records of Saunders Company failed to show that

appellant had ever paid the Saunders Company for any of the merchandise covered by the invoices. It was further shown that after the Saunders Company began to make an investigation of the shortages appellant left and went to Mexico, where he remained for the greater part of three years, and his whereabouts was unknown to the authorities of Big Spring who were looking for him to answer a complaint which had been filed against him. Certain plumbing equipment which corresponded to that shown on the invoices was found in appellant's possession and the serial numbers had been removed.

Appellant did not testify or offer any evidence in his behalf. The court charged on the law of accomplice testimony and circumstantial evidence.

This is a brief resume of the lengthy record, but we deem it sufficient to support our conclusion that the evidence is sufficient to support the verdict; and we shall address ourselves to a discussion of the two questions strenuously urged by brief and in argument.

It is first contended that the trial court erred in failing to grant a continuance. The motion in the transcript does not show that it was ever presented to or acted upon by the trial court, and therefore under our holdings in *Bullard v. State*, 331 S.W. 2d 222, *Crawford v. State*, 305 S.W. 2d 362, and the cases there cited, there is nothing presented for review. There has been transmitted to this Court a document entitled "Motions before the Court," but it has not been authenticated by anyone, and under the authority of *Holtzinger v. State*, 284 S.W. 2d 158, and Article 759a, V.A.C.C.P., cannot be considered.

For the same reason, appellant's claim of error growing out of the court's failure to grant a postponement cannot

be considered.

No reversible error appearing, the judgment is affirmed.

Morrison, Judge

(Delivered May 3, 1961)

APPENDIX "B"

CLERK'S OFFICE, COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

I, GLENN HAYNES, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in Cause No. 33,045, styled:

V. A. GOMEZ, *Appellant*
v.
THE STATE OF TEXAS, *Appellee*

judgment of the 118th Judicial District Court of Howard County was affirmed on May 3, 1961, Appellant's Motion for Rehearing overruled, without written opinion, on June 14, 1961, Leave to File Appellant's Second Motion for Rehearing and to Stay Mandate denied on June 16, 1961, and mandate issued on June 16, 1961.

THEREFORE, with the overruling of Appellant's Motion for Rehearing, this cause was disposed of by this Court on June 14, 1961, appellant having exhausted all remedies in this, The Court of Criminal Appeals of Texas, and the court of last resort of Texas, in criminal cases, and said judgment has now become final on the docket of this court.

WITNESS my hand and seal of said Court, at office, in Austin, Texas, this 22nd day of June, A.D., 1961.

/s/ GLENN HAYNES
Glenn Haynes
Clerk, Court of Criminal Appeals of Texas

(Seal)

RESPONDENT'S BRIEF IN OPPOSITION

IN THE

Supreme Court of the United States

October Term, 1961

No. 300

V. A. GOMEZ, *Petitioner*

v.

THE STATE OF TEXAS, *Respondent.*

Respondent's Response to
Petition for Writ of Certiorari

BRIEF FOR THE RESPONDENT

WILL WILSON
Attorney General of Texas

LEON F. PESEK
Assistant Attorney General

FRANK J. MALONEY
Assistant Attorney General

SAM WILSON
Assistant Attorney General
Attorneys for Respondent

INDEX

Subject Index

	Page
STATEMENT	2
QUESTIONS PRESENTED	3
ARGUMENT	
I. DID THE TEXAS COURT OF CRIMINAL APPEALS HAVE BEFORE IT SUFFICIENT EVIDENCE, AND WAS THE RECORD SUFFICIENTLY COMPLETE UPON WHICH TO AFFIRM THE JUDGMENT OF THE TRIAL COURT?	3
II. WAS PETITIONER DENIED DUE PROCESS BY THE TRIAL COURT HAVING DENIED HIS MOTION FOR A CONTINUANCE?	11
CONCLUSION	19

Authorities

CASES	Page
Appalachian Power Co. v. American Institute of Certified Public Accountants, 361 U.S. 82	10
Betts v. Brady, 316 U.S. 455	19
Bullard v. State, 331 S. W.2d 223	8
Byrd v. Blue Ridge Rural Electric Co-op Inc., 356 U.S. 525, 357 U.S. 933	10
Crawford v. State, 305 S.W.2d 262	7
Gray v. Ellis, 257 F.2d 159	11
Holtzinger v. State, 284 S.W.2d 158	8
Miller v. United States, 357 U.S. 301	10
Vernon's Code of Criminal Procedure of Texas	
Article 759a	6,7,8
Article 760d	4,5,6,9
Article 760e	6,8
Texts	
2 L.Ed. Sec. 1332	10

IN THE

Supreme Court of the United States

No. 300

October Term, 1961

V. A. GOMEZ, *Petitioner*,

v.

THE STATE OF TEXAS, *Respondent.*

Respondent's Response to
Petition for Writ of Certiorari

TO THE HONORABLE SUPREME COURT
OF THE UNITED STATES:

Petitioner was convicted in the District Court of Howard County, Texas, for receiving and concealing stolen property of the value of over $50.00, to-wit: a 30-gallon water heater. His punishment was assessed at confinement in the penitentiary for not less than two and not more than seven years. Petitioner appealed this case to the Texas Court of Criminal Appeals, which was affirmed by the Court of Criminal Appeals in a written opinion dated May 3, 1961. 346 S.W. 2d 847.

On or about the 10th day of August, 1961, Petitioner filed a petition for writ of certiorari before this Honorable Court. By letter dated October 19, 1961, this Honorable Court notified the office of the Attorney General of the State of Texas that such petition was docketed, and this office was requested to file a response to such petition for writ of certiorari, and further requested that such response

> ". . . discuss the sufficiency of the record in the case before the Texas Court of Criminal Appeals."

Pursuant to this request Respondent, the State of Texas, will limit its response to this request and Petitioner's main contention that he was denied counsel of his own choice to defend him.

STATEMENT

The State of Texas submits that the evidence upon which the trial court found the accused guilty, and upon which evidence the Texas Court of Criminal Appeals affirmed such case, is sufficient to support the conviction. That the evidence discloses, generally, that the hot water heater in question was placed in Petitioner's house and in the property where Petitioner lived; that the heater was stolen by a person named Wright; that it was installed at Petitioner's request by a person known as T. T. Galan; that as soon as Petitioner was told that the matter was being investigated by the authorities Petitioner left for Mexico and stayed there approximately three years; that the other transactions showed the intent and the knowledge that the property was stolen; that

there had never been an account with the company from which the property was stolen by Petitioner; that the Petitioner had never paid the company for such property; that there are numerous invoices and bills made out to Petitioner of which he received some copies; and the facts and circumstances show that Petitioner knew the property was stolen; that he received it and it was concealed.

QUESTIONS PRESENTED

I

DID THE TEXAS COURT OF CRIMINAL APPEALS HAVE BEFORE IT SUFFICIENT EVIDENCE, AND WAS THE RECORD SUFFICIENTLY COMPLETE UPON WHICH TO AFFIRM THE JUDGMENT OF THE TRIAL COURT?

II

WAS PETITIONER DENIED DUE PROCESS BY THE TRIAL COURT HAVING DENIED HIS MOTION FOR A CONTINUANCE.

ARGUMENT

QUESTION NO. 1 (Restated)

DID THE TEXAS COURT OF CRIMINAL APPEALS HAVE BEFORE IT SUFFICIENT EVIDENCE, AND WAS THE RECORD SUFFICIENTLY COMPLETE UPON WHICH TO AFFIRM THE JUDGMENT OF THE TRIAL COURT?

Upon being sentenced by the trial court to the State penitentiary for a term of not less than two nor more than seven years, Petitioner herein gave notice of appeal to the Texas Court of Criminal Appeals. Petitioner requested that bond be set by the

Trial Court pending his appeal. Bond was set and approved by the Court. The Transcript and the Statement of Facts were applied for on or about the 9th day of December, 1960, and such Transcript was filed with the Clerk of the Texas Court of Criminal Appeals on January 3, 1961, and the Statement of Facts was filed with said Clerk on February 25, 1961. Subsequent to the last mentioned date, and at a date 153 days after Petitioner gave notice of appeal, attorneys sought to file with the Texas Court of Criminal Appeals a volume of testimony entitled "Motions Before the Court." Such volume purports to be the testimony at the time Petitioner's motion for a continuance was heard, together with other motions which were made, heard, and determined by the Court prior to the trial.

Articles 760d and 760e, Texas Code of Criminal Procedure, provide as follows:

"Art. 760d. Time for filing bills of exception

"A defendant in a criminal prosecution shall have *ninety (90) days after the giving of notice of appeal* within which to prepare and file his bills of exception with the trial judge; and thereafter the trial judge may have until one hundred (100) days have elapsed after notice of appeal was given within which to consider and act on the same.

"A filing by the defendant of his bills of exception with the clerk of the court shall constitute a filing of the bills with the trial court, within the meaning of that term as here used. The clerk of the court will immediately call the trial judge's attention to the filing of the bills of exception.

"Unless the trial court refuses to approve the bills of exception within the time above specified, the bills of exception shall be considered as approved by the trial court and no other approval thereof is necessary.

"If the trial judge refuses to approve the bills of exception, he shall so note, and state thereon his reason or reasons for refusal, and return the bills to the clerk of the court, who shall note on the bills of exception the date and time the bills were returned to him by the trial judge.

"The clerk of the court shall immediately notify the defendant or his counsel that the trial judge has refused the bills of exception.

"If the defendant agrees to the reasons assigned by the trial judge for refusing to approve the bills of exception, he may note such fact on the bills of exception, in which event the bills of exception will stand approved with the reasons of the trial judge as a part of and qualification to the bills of exception.

"In the event the defendant does not accept the trial court's reasons for refusing to approve the bills of exception, then the defendant or the trial judge shall have fifteen days time from and after the date the trial court returned the refused bills of exception to the clerk of the court within which to prepare and file bystanders bills of exception.

"Nothing in this Act shall prevent the defendant and the trial judge from agreeing upon or to the correctness of the bill of exception and the filing thereof in the trial court within *ninety days* from the date notice of appeal was given. Such a bill of exception shall be considered as

approved by the trial judge. Acts 1951, 52nd Leg., p 817, ch. 462, s1, as amended Acts 1959, 56th Leg., p. 749, ch. 362, s 1." (Emphasis added)

"Art. 760e. Motions, exceptions and statement of facts constitute bill of exceptions

"All motions for change of venue, motion for new trial based on jury misconduct or that the jury received new evidence during deliberation, motions set aside an indictment or information,motions to quash a venire or jury panel, or motions for continuance together with any answer thereto, the court's order thereon showing defendant's exception to the ruling, together with a Statement of Facts, where facts were adduced in connection therewith shall constitute the defendant's Bill of Exception, and no formal Bill of Exception need be prepared and filed. Provided, however, that the defendant may file a formal Bill of Exception. Acts 1951, 52nd Leg., p. 817, ch. 463, s 1."

Article 759a, Texas Code of Criminal Procedure, provides in part as follows:

"Section 1. A. Where the defendant in a criminal case appeals, he is entitled to a Statement of Facts which shall be sent up with the record.

"E. If the Statement of Facts is agreed to by the defendant or his counsel, and the attorney representing the state, it need not be approved by the court. If the parties cannot agree on a Statement of Facts within seventy-five (75) days after giving of notice of appeal, the trial judge shall prepare and certify to a Statement of Facts. Acts 1951, 52nd Leg., p. 819, ch. 465.

"Sec. 4. The defendant shall file said statement of facts in duplicate, with the clerk of the trial court *within ninety (90) days* after the date of giving notice of appeal; and for good cause shown, the judge trying the cause may further extend the time in which to file the statement of facts, and shall have the power, in term time or vacation, upon application for good cause to extend for as many times as deemed necessary the time for preparation and filing of statement of facts, and the approval of the statement of facts after the expiration of the ninety (90) day period shall be sufficient proof that the time for filing was properly extended. As amended Acts 1959, 56th Leg., 1st C. S., p. 20, ch. 7, s 1.

"Sec. 6. This Statute shall apply to all Statements of Fact relating to any motion heard in the case, *but the facts adduced in connection with any Motion shall be filed with the clerk separately from the facts adduced bearing upon the guilt or innocence of the defendant.*" (Emphasis added)

The law concerning these Articles has been well settled in this State over a period of many years. The Texas Court of Criminal Appeals in the late case of *Crawford v. State*, 305 S.W.2d 262 (Crim. App. 1957), has discussed it most completely.

In this case the appellant contended in his motion for rehearing that the appellate court was in error in refusing to consider his complaints to the indictment because it was shown in the Statement of Facts of the evidence adduced upon the main trial that he excepted to the action of the Court in over-ruling his two motions to quash. He contended further that such exceptions to the Court's rulings were sufficient

to constitute informal bills of exception under the provisions of Article 759a and 760e of the Texas Code of Criminal Procedure, and were therefore properly before the Court for review. The Court held at page 366:

> "While under the provisions of sec. 2 of the above-quoted statute certain rulings of the court with the defendant's objection and exception thereto, together with the statement of facts shall constitute a bill of exception, section 6 of the statute provides:
>
> "This Statute shall apply to all Statements of Fact relating to any Motion heard in the case, but the facts adduced in connection with any Motion shall be filed with the clerk separately from the facts adduced bearing upon the guilt or innocence of the defendant.'
>
> "By the provisions of sec. 6, above quoted, to constitute a bill of exception to the court's ruling on a motion, the statement of facts of the evidence adduced in connection therewith shall be filed separately from the facts adduced upon the main trial on the issue of guilt of the accused.
>
> "The record in the instant case contains no separate statement of facts of the evidence which was adduced in connection with the appellant's motions to quash the indictment and in the absence thereof, appellant's exceptions to the court's ruling thereon do not constitute a bill of exception.
>
> "We overrule appellant's contention that the record shows that through no fault or lack of diligence on his part, has been deprived of and denied his bills of exception to the court's

rulings on the motions to quash the indictment and for such reason the case should be reversed.

"Under Art. 760d, V.A.C.C.P., appellant had 90 days after giving notice of appeal in which to prepare and file his bills of exception. It was incumbent upon appellant and his duty to see that his exceptions to the court's rulings were properly shown in the record. . . . .."

This decision finds further support in *Holtzinger v. State*, 284 S.W.2d 158 (1955), and in *Bullard v. State*, 331 S.W.2d 223 (1960), and the cases cited therein.

It was incumbent upon Petitioner to see to it that the Statement of Facts and the Transcript of his trial contained everything that he wished the appellate court to review. The evidence, as will be discussed under the other point in this brief, clearly shows that Petitioner had qualified legal assistance at all times. Under the above quoted sections neither the District Attorney nor the District Judge could authenticate the volume entitled "Motions Before the Court," as the 90-day period had elapsed when it was presented.

As previously stated, these rules, or rules of similar import have been in existence in this State for many years, and Petitioner does not assert that they are not being followed in all cases before the Court of Criminal Appeals of Texas. This Honorable Court realizes that every State court must have definite and well defined rules to operate under so that chaos will not result. This Honorable Court, itself, has very definite rules that must be compiled with in order to

seek its jurisdiction. This Court will ordinarily accept the determination of State laws and procedures as found by the courts of appeal of the various states, and especially where neither party disputes the interpretation. *Appalachian Power Co. v. American Institute of Certified Public Accountants*, 80 S.Ct. 16, 361 U. S. 82; *Miller v. U. S.*, 80 S.Ct. 1190, 357 U. S. 301, 2 LEd. Sec. 1332; *Byrd v. Blue Ridge Rural Elec. Co-op, Inc.*, 78 S.Ct. 893, 356 U. S. 525 (Rehearing den. 357 U. S. 933).

The Texas Court of Criminal Appeals had before it at the time the Petitioner's case was on review a complete Transcript, a copy of which is before this Court, together with a complete Statement of Facts adduced at the trial of Petitioner's case on the merits, which consists of 196 pages, with exhibits. The Court had also the briefs of Petitioner's attorney as well as the State's. The Texas Court of Criminal Appeals found that the facts justified conviction, and resolved all informal bills of exception in favor of the State.

Petitioner does not now contend, nor did he ever contend, that the evidence presented during the trial was insufficient to find him guilty but, on the contrary, the evidence clearly discloses that Petitioner was guilty of the offense charged, and the Texas Court of Criminal Appeals properly affirmed the judgment of the trial court.

Your Respondent therefore submits that Petitioner was given a full, complete, and equitable trial, and that the evidence upon which the Jury found Petitioner guilty was reveiwed by the highest appellate

court of this State and found to be without error.

Respondent further submits that Petitioner was not denied due process of law under the Fourteenth Amendment of the Constitution of the United States and thus there is no Federal question for this Court to determine.

QUESTION NO II (Restated)

WAS PETITIONER DENIED DUE PROCESS BY THE TRIAL COURT HAVING DENIED HIS MOTION FOR A CONTINUANCE.

Petitioner, in his petition for writ of certiorari cites and enumerates on a great number of cases that have been decided by this Court on the question of an accused's right to counsel in a criminal trial. Your Respondent, the State of Texas, does not quarrel with the decisions in these cases where this Court has held under the circumstances and facts stated therein that there was a denial of due process to an accused in denying him counsel at his trial. But the facts and circumstances enumerated in those cases have no parallel and do not come within the facts of this case. The facts of this case more closely parallel the case of *Gray v. Ellis*, 257 F.2d 159, U. S. Court of Appeals, Fifth Circuit (1958), wherein the Court held at page 162:

> "We think that where a state court has so far conformed its conduct of a trial in a noncapital case to basic concepts of due process as to appoint able and experienced counsel, and to urge an accused to use the services of such counsel (which is not denied by petitioner here), and

> there is no express allegation that the accused complained to the court of the particular alleged defects in such counsel's conduct of petitioner's case as are now raised here, there has been no such prima facie showing of unfairness as would require a hearing under the Federal statutes."

The procedure followed by the District Attorney and the trial court did not violate any of Petitioner's rights which are guaranteed to him under the Constitution of the State of Texas and of the United States. His counsel, in his petition, enumerated at great length concerning accused right to counsel during the trial of a criminal case, and particularly to an accused right to counsel of his own choice.

The State of Texas takes the position that this right does not descend to an accused charged with a violation of the law without certain reasonable restraints. Your Respondent submits that in a trial of a criminal case an accused must exercise good faith in obtaining counsel of his own choice, and is prohibited from juggling attorneys in such a way as to present himself on trial date with a new attorney who contends that he is unable to defend his client on that day.

Your Respondent submits that the District Attorneys and the Courts of this State have a solemn duty to the people of Texas to speedily bring to trial one who has been accused of an offense, and to oppose with all diligence every attempt to thwart justice by an accused's methods which keep him from standing before the bar of justice for trial.

In order to give this Honorable Court a clear and complete picture as to what transpired at and during the trial of the Petitioner, it requested a statement by the District Attorney who tried the case and by the Honorable District Judge who heard the case. These statements are made a part hereof and are marked A. and B. of the Appendix. These statements, together with the uncontroverted evidence which is before this Court by way of the Transcript of the trial and the volume marked "Motions Before the Court" disclose briefly the following:

Petitioner was indicted in Cause No. 3395, which was a companion case to No. 3761, 3759, 3760, and 3762 on October 30, 1957. Before a capias could be served upon Petitioner he absented himself from the State of Texas on or about October 30, 1957, and remained away until July 18, 1960. During this period of time the testimony of the District Attorney which is found on page 28 of the volume marked "Motions Before the Court," testified that Mr. Clyde Thomas, a practicing attorney in Big Springs, Texas, talked to him in the early part of 1958 concerning Petitioner's surrender, seeking agreements pursuant to such surrender. On page 29 the District Attorney testified that he was subsequently contacted by Mr. George Thomas, a practicing attorney in Big Spring, for the purpose of reaching some type of agreement in the event petitioner would surrender himself. Thereafter, Mr. Calloway Huffaker, a practicing attorney in Tahoka, Texas, contacted him con-

cerning a similar proposition. Subsequent to that, Mr. Fred Semann, a practicing Attorney in San Antonio, Texas contacted the District Attorney and stated to him that he had seen Petitioner in Mexico and asked for certain information concerning the case, and stated that he might be employed to defend Petitioner. The District Attorney stated at page 31 of said Motions Before the Court that subsequent to Mr. Semann's conversation Mr. George Thomas again contacted the District Attorney, setting a definite date on which he would bring in Petitioner, and stated that he represented Petitioner, and on a day certain he did bring in Petitioner before the Court, and did assist in the making of the bond. Mr. Thomas had talked settlement with the District Attorney on several occasions, and even asked the District Attorney to forego the criminal trials until certain civil suits were tried. On August 1, 1960, Thomas notified the District Attorney that he no longer represented Petitioner herein.

At pages 32 and 33 of the volume marked "Motions Before the Court" the District Attorney testified that he was contacted by Mr. Wayne Basden, a practicing attorney in Big Spring, Texas, and Mr. Warren Burnett, a practicing attorney in Odessa, Texas, was informed by them that they represented Petitioner; that both of these attorneys appeared in Court before the Trial Judge for the purposes of setting new bonds on new indictments. At the time of their appearance Petitioner again was a fugitive,

and that the capias resulting from the new indictments returned by the Grand Jury which met in July of 1960 in Howard County could not be served. During this period of absence both Attorneys Basden and Burnett appeared before the Court and indicated that they represented Petitioner, and asked the Court to set bond. The District Attorney testified further that on two subsequent occasions Attorneys Basden and Burnett interviewed the State's principal witnesses as well as other State witnesses, and on many other occasions represented to the District Attorney that they represented Petitioner herein.

At page 34 of the Motions Before the Court the District Attorney testified further that attorneys Basden and Burnett discussed with him the possibility of setting the cases, and that the District Attorney notified attorneys Basden and Burnett on October 17, 1960, that the case against Petitioner herein was set for December 5, 1960, and that he never received a reply to this notice; that on November 1, 1960, he first received notice through the District Clerk of Howard County that Mr. Bernard Golding was counsel in this case. He testified at page 36 that he sent a copy of attorney Golding's letter to attorneys Basden and Burnett, and asked these attorneys who was the attorney in the case, and that he did not receive a reply to this letter, nor did the Court.

Respondent herein would show that from the first page of the District Attorney's affidavit attached hereto (Appendix A) stated under oath, that he per-

sonally saw attorney Basden, both overtly and covertly, give aid and assistance to Petitioner herein during his trial, as well as to the Court-appointed attorney, Mr. W. H. Eyssen, Jr., both in the Courtroom and elsewhere; that after the trial of the case attorney Basden made all of the arrangements with the Court Reporter for the preparation of the record, and did order the Transcript and the Statement of Facts.

In addition to these matters the District Attorney, in his sworn answer to Petitioner's first motion for a continuance plead that starting on September 12, 1960, attorneys Basden and Burnett represented Petitioner in a civil case entitled *Walter Greer v. V. Gomez*, No. 11,720, and that on November 14, 1960, attorney Basden represented Petitioner in a civil case entitled *Doris Carr, et vir. v. V. A. Gomez*, No. 12,174. The State's answer further showed that such continuance did not ask for a postponement to a later day of the same term, but in effect asked for an indefinite postponement.

The evidence disclosed further in the volume entitled "Motions Before the Court" at pages 57 and 58, the testimony of Phillip C. Schlusser who testified that he was obtaining information for attorney Basden concerning Petitioner's case the day before he was put on the stand to testify. At page 61 the record shows that attorney Basden, during this hearing for a continuance, was conferring with Petitioner and his Court-appointed attorney; that witness Schlusser admitted that he lied on two occasions the day before when he said that he was getting in-

formation concerning Petitioner's case for attorney Basden. This is found on page 66 of the volume entitled "Motions Before the Court."

That attorney Basden, on page 17, testified that he thought he was hired by Petitioner to represent Petitioner in the trial of his criminal case, and admitted that he and attorney Burnett, in front of the Judge, requested the District Attorney to set Petitioner's cases back in September 1960; that he and attorney Burnett went and talked with several witnesses, made investigations, and talked with various people to obtain information, and that they did obtain information. And he testified further, at page 20 "and we haven't asked for a continuance in this case." He further testified at page 21 that about a month prior to the date that he was giving this testimony, which was on or about December 5, 1960, that he was notified that he no longer represented Petitioner.

From the Honorable Trial Judge's statement, which is attached hereto (Appendix B) he states that on the 5th day of December, 1960, when Petitioner entered the Courtroom and seated himself at the "defendant's counsel table" no other attorney was with him at that time; that attorney Basden was present in the Courtroom but was seated at a different table. The Court further states that while he was considering defendant's first motion for a continuance attorney Basden was observed by him on two occasions to approach the defendant at counsel table

to talk briefly with Petitioner in a Confidential manner. The Court admits that he does not know the topic of these conversations.

Your Respondent herein submits that this evidence clearly discloses that at the time of Petitioner's trial he was not denied due process in any way; that if he did not have counsel of his own choice at that time it was due to his own negligence or overt acts, and Respondent herein submits that in truth and in fact Petitioner had counsel of his own choice in attorney Basden, who worked with Petitioner prior to the trial, who was employed and did conduct investigations and interview witnesses, and that the knowledge and experience resulting therefrom were used and shared with Petitioner and his Court- appointed counsel during the trial. The trial court, out of an abundance of precaution, and under the theory of constitutional due process was not going to allow justice to be thwarted by Petitioner, who had knowledge for six weeks when his case was set for trial, and who had been given ample opportunity to employ counsel of his own choice, and who at the time the case was set, had two attorneys of record to represent him. Nor was the Court to stand idly by while Petitioner attempted to stand nakedly before the bar of justice contending that the Court could not try him because his last chosen attorney was unable to be present to defend him, knowing full well that the Court could not appoint him counsel under Article 494 of the Texas Code of Criminal Procedure because he was not indi-

gent person. The Honorable Trial Court, on his own motion, and under the theory of constitutional due process, and in order to prevent Petitioner from later complaining, in the event of conviction, that he was denied due process because of failure of counsel to represent him, and that his inexperience in law prevented him from properly defending himself, appointed qualified counsel to defend him.

In the case of *Betts v. Brady*, 316 U.S. 455, this Court gave support to the trial court's action when it held:

> ". . . Every court has power, if it deems proper to appoint counsel when that course seems to be required in the interest of fairness."

This Court need only to read the Statement of Facts in Petitioner's trial, as well as the volume entitled "Motions Before the Court" to realize that Court Appointed counsel was no novice in the court room. And without detracting from the able manner in which said Court Appointed counsel defended Petitioner it is inescapable that such talented advocacy had the guiding hand of one who had thoroughly acquainted himself with the facts, the testimony which State witnesses would give, and a theory for the defense of this case.

CONCLUSION

Petitioner herein having failed to show that he was in any way denied any right given to him under the Fourteenth Amendment of the United States,

his petition for a Writ of Certiorari should in all things be denied.

Respectfully submitted,

WILL WILSON
Attorney General of Texas

LEON F. PESEK
Assistant Attorney General

FRANK J. MALONEY
Assistant Attorney General

SAM WILSON
Assistant Attorney General

This is to certify that two copies of this instrument have been served upon Honorable Bernard A. Golding by depositing same in the United States Mail addressed to the Honorable Bernard A. Golding, 432 Niels Esperson Building, Houston 2, Texas, with sufficient postage thereon.

LEON F. PESEK

APPENDIX "A"

THE STATE OF TEXAS
COUNTY OF HOWARD

KNOW ALL MEN BY THESE PRESENTS:

AFFIDAVIT

Before me, the undersigned authority, a Notary Public in and for Howard County, Texas, on this 2nd day of November, 1961 personally appeared Guilford L. Jones, who being by me first duly sworn upon oath deposed and stated as follows:

My name is Guilford L. Jones; I am the duly elected, qualified and acting District Attorney of Howard County, Texas and was such at all times material hereto. In connection with the application for Writ of Certiorari in the Supreme Court of the United States by V. A. Gomez, contending, among other things, that the Honorable Supreme Court of the United States should grant this application by reason of the insufficiency of the record before the Texas Court of Criminal Appeals and/or by the reason of the refusal of the trial court to grant a continuance in such cause, or the deprivation of defendant of qualified counsel or of counsel of his own choosing, I desire to state as follows.

I hereby reaffirm each of the matters stated in the State's Answer to the first motion for continuance herein, such motion being hereto attached and expressly made a part hereof, and direct the Court's attention to the facts therein stated regarding the absence of the defandant from the continental limits of the United States while a fugitive from justice

and the other facts therein stated pertaining to the prior employment by the defendant of various other attorneys to represent him in this cause, and the employment by the defendant of the Honorable Bernard A. Golding at a date subsequent to the setting of this matter for trial. In addition thereto, your Affiant would state that he personally observed the Honorable Wayne Basden, both overtly and covertly, throughout the trial of this cause, giving aid and assistance to the defendant and to his appointed attorney, the Honorable W. H. Eyssen, Jr., both in the courtroom and elsewhere. In this respect it is pointed out that in the hearing before the court on the motion for continuance the Honorable Wayne Basden testified to the court under oath that he had previously been employed to represent V. A. Gomez in these criminal cases and that both he and the Honorable Warren Burnett had represented to the court that they did represent Gomez and would represent him in the trial of these cases. In this connection it is further stated that after the trial of this cause the Honorable Wayne Basden made all of the arrangements with the Court Reporter for the preparation of the record of this trial and that the said Honorable Wayne Basden is the person referred to in the affidavit by the Honorable W. H. Eyssen, Jr. as "a friend of mine" who ordered the transcript and statement of facts prepared. In this connection further, your Affiant would state that after the trial of this cause, your Affiant asked the Honorable Wayne Basden directly whether he did or did not continue to represent Gomez and was in-

formed by the Honorable Wayne Basden that he, Basden, had been employed by Gomez and/or Golding to see to the preparation of the record in this case. In this same connection it is pointed out that the Wayne Basden who notarized the Affidavit of the Honorable W. H. Eyssen, Jr., such being the affidavit which was filed in the Court of Criminal Appeals of Texas, is the same Wayne Basden who was and continued throughout to act as an attorney of counsel for the said V. A. Gomez, both in the trial and in the appeal of this cause. In this connection it is asserted that the defendant, V. A. Gomez, was not deprived of the counsel of his choice but that in fact, he had the benefit of the services of both the court appointed attorney, the Honorable W. H. Eyssen, Jr. and the attorney of his choice, the Honorable Wayne Basden.

In connection with the trial of this cause it is pointed out that although it is urged by the Appellant that the Defendant was convicted and was given a seven year sentence in the Texas Penitentiary for his crime, nowhere therein is there any assertion, claim or showing of any defense or of any reason why justice was miscarried in any respect. In truth and in fact, the attorney who represented the defendant by appointment in this case, the Honorable W. H. Eyssen, Jr., did a thorough and creditable and a very vigorous and enthusiastic job of defending this lawsuit. In this connection it is pointed out that the transcript in this case contains forty-seven pages in which there is included the following mo-

tions for the defendant prior to trial: Defendant's First Motion for Continuance, Supplemental Motion for Continuance, Motion for Ten Day's Postponement, Motion for Change of Venue, accompanied by affidavit of witnesses on such motion, and Motion to Consolidate Causes. In the trial of the cause it will be noted that the attorney for the defendant made frequent and pertinent objections to the admissibility of evidence and at the conclusion of the trial presented a motion for instructed verdict, together with defendant's objections to the charge of the court and a notice of appeal. In this same connection, although the attorney for the defendant, W. H. Eyssen, Jr., now contends that he was inexperienced and not qualified to represent the defendant on the trial of this cause, the fact is that at the time of appointment he expressed some eagerness to be appointed and satisfaction of having received said appointment both to the court and thereafter to the Counsel for the State, and in fact, after the cause had been tried and decided by the jury, he expressed his personal appreciation to the Counsel for the State for the courteous and fair treatment he had received throughout the trial of such cause.

Each of the motions above described preliminary to the commencement of the trial of the case on its merits was presented to the court and evidence and argument of counsel heard thereon as is shown by the volume entitled by the Court Reporter, "Motions Before the Court", consisting of some one hundred sixty-eight pages of testimony on the mo-

tions above stated and two additional motions which were presented by the court appointed attorney to quash the indictment. Each and every motion, together with evidence, was disposed of by the court prior to commencement of trial on the merits.

In connection with that portion of the affidavit of W. H. Eyssen, Jr. relating to a meeting in the office of the Honorable Ralph W. Caton, District Judge, on May 15, 1961, it is correct that the attorney asked the undersigned at that time to approve the volume "Motions Before the Court" and that the undersigned refused to do so, and that the undersigned stated he would object to the court approving such "Motions Before the Court" at this time, for the reason that it was not within the power of the court to give his approval more than ninety days after the giving of notice of appeal. In this connection, it is pointed out that May 15, 1961 was a date one hundred fifty-three days after the giving of notice of appeal, and that the undersigned felt that if the court attempted to approve such "Motions Before the Court" more than ninety days after the giving of notice of appeal it would be to give a "color of legality" to something which was contrary to the law and which was beyond the power of the court. In such connection further, it is agreed that, as is stated in the affidavit by W. H. Eyssen, Jr., that the court declined to approve such "Motions Before the Court" for the reason that the court felt that in so doing he would exceed his power as Judge.

/s/ Guilford L. Jones

Guilford L. Jones

Subscribed and sworn to before me, a Notary Public in and for Howard County, Texas, by Guilford L. Jones, known to me to be the person whose signature appears above, to certify which witness my hand and seal of office.

/s/ Julia Williams

Julia Williams
Notary Public in and for
Howard County, Texas

SEAL

Cause Nos. 3395, 3759, 3760, 3761 and 3762
STATE OF TEXAS
vs.
V. A. GOMEZ
In the District Court of
Howard County, Texas

ANSWER TO MOTION FOR CONTINUANCE

Now comes the State of Texas by and through her District Attorney and respectfully files this answer to the motion of the Defendant for a continuance of this cause which is set for trial December 5, 1960, such motion having been received and filed by the Court on the 30th day of November, 1960, the State respectfully urges such motion be denied and states that such motion is not well taken for the following reasons:

1.

For the reason that the defendant has apparently consulted with, been advised by, and has been represented by a number of attorneys. In this connection, your Affiant states he has been contacted by each of the following attorneys at various times, each of whom represented that he was either employed by the Defendant or had been consulted by the defendant with the view point of being so employed: The Honorable Clyde E. Thomas, Sr., Big Spring, Texas, the Honorable Calloway Huffaker, Tahoka, Texas, the Honorable Fred Semaan, San Antonio, Texas, the Honorable George T. Thomas, Big Spring, Texas, the Honorable Warren Burnett, Odessa, Texas, and the Honorable Wayne Basden, Big Spring, Texas, in addition to the Honorable Bernard A. Golding, Houston, Texas.

2.

Affiant would show the Court that the first indictment in this case was presented October 30, 1957, and that all other indictments are companion cases to such original charge, and in this connection, would show the Court that the capias issued by the Clerk of this Court in Cause No. 3395, October 30, 1957, was not served and could not be served because the defendant was a fugitive from justice and was outside the continental limits of the United States and was outside the State of Texas for substantially all of the time from October 30, 1957, to July 18, 1960.

3.

Affiant would further show the Court that sometime prior to July 18, 1960, he was informed by Mr. George T. Thomas that he, Mr. Thomas, represented the defendant, and would bring the defendant in and surrender him, which was done on July 18, 1960, and for sometime thereafter, Mr. George T. Thomas represented to the Affiant and to the Court that he had been employed by and would represent the defendant, and Mr. Thomas discussed with Affiant the possibility of an agreed setting in the case.

4.

Subsequently, on about the 1st day of August, 1960, Affiant was informed by Mr. George T. Thomas that he no longer represented the defendant, and on approximately the same date Affiant was informed by Mr. Warren Burnett and by Mr. Wayne Basden that they were now the attorneys for the

defendant. In this connection, Mr. Burnett and Mr. Basden then sought to reach an agreement with the Affiant as to the amount of bond to be recommended in Cause Nos. 3759, 3760, 3761 and 3762, the defendant then again being a fugitive who could not be found for service of capias on these cases. At such time Mr. Burnett and Mr. Basden, each, additionally represented to the Court that they had been employed by and would represent the defendant, and urged the Court to set bail bond in an amount agreeable to them. At the same time and on several subsequent occasions, Mr. Burnett and Mr. Basden discussed with Affiant some agreement as to the setting for trial of these cases, and on at least two occasions personally known to Affiant, and each of the attorneys contacted and discussed the case with the State's principal witness.

5.

That on the 17th day of October, 1960, by direction of the Court, Affiant notified Mr. Burnett and Mr. Basden that each of these cases had been set by the Court for trial at 10:00 o'clock A.M., December 5, 1960, such notification being by regular course United States first class mail. On November 1st, 1960, the Honorable Wade Choate, Clerk, received a letter dated November 1, 1960, by the Honorable Bernard A. Golding notifying the Clerk that he, Mr. Golding, was now the *sole* attorney for the defendant. In this connection, it should be noted that the defendant has appeared and participated in this Court in two civil cases, during times material herein, being the cases of Walter Green vs. V. A. Gomez,

Cause No. 11,720, which started to trial on the 12th day of September, 1960, and the case of Doris Carr, et vir, vs. V. A. Gomez, Cause No. 12,174, which started to trial on the 14th day of November, 1960, and that in the first such civil suit the defendant was represented by both Mr. Burnett and Mr. Basden, and that in the second cause he was represented by Mr. Basden.

Affiant would show the Court that on about the 4th day of November, 1960, Affiant talked with the Honorable Bernard A. Golding by phone to inquire as Mr. Golding was aware of the fact that these causes were set for trial December 5. Your Affiant received no definite answer from Mr. Golding as to whether he was aware of such fact or not, but was informed by Mr. Golding that he was due to participate in a trial in Federal Court in New York City beginning November 14, 1960, and that such trial would last for approximately fifteen weeks. Your Affiant, at that time, notified Mr. Golding he would not be able to agree to a continuance, and suggested that Mr. Golding prepare and forward to the Court a motion for continuance if it was his desire to obtain a continuance.

6.

On November 2, 1960, your Affiant wrote to Mr. Warren Burnett, forwarding to him a photostatic copy of the letter which had been received by the Clerk dated November 1, 1960, from Mr. Golding, with the request that if it was true that Mr. Burnett no longer represented the defendant that he ac-

knowledge such fact in order that your Affiant and the Court might have verification as to who were the attorneys for the defendant in these causes. No answer has ever been rceived to this letter.

On November 18, 1960, your Affiant received a copy of a letter from the Honorable R. W. Caton, District Judge, addressed to Mr. Golding in substance requesting an expressing from the attorneys on both sides as to whether they expected to be ready for trial on December 5 in these causes. At such time, your Affiant notified the Court that he did intend and expected to be ready for trial.

7.

Your Affiant would specially show the Court that he has been informed this date in a telephone conversation with the Honorable Richard H. Levet, United States District Attorney, New York City, New York, that the case in which Mr. Golding is now participating was set for trial at a date "prior to October 10, 1960" and that thus Mr. Golding knew at the time he accepted employment in this case that he had a conflict by reason of a prior setting, and that the defendant, through his then attorneys, Mr. Warren Burnett and Mr. Wayne Basden, was on notice of the setting of these cases in this Court, and that whether Mr. Golding was informed by the defendant of such setting or not is, therefore, immaterial. In this same connection, it is particularly pointed out that such motion for continuance does not ask for a postponement to a later day of the same term, and that such motion shows

on the face of it that at the time of accepting employment herein Mr. Golding was faced with a very difficult, complex and extensive trial proceedings which are apparently taking all of his time and keeping him outside the State of Texas for almost three months, and that under the circumstances, it is unreasonable to request this Court to postpone its business for the convenience of the defendant and his latest employed counsel. Particularly in view of the fact that this defendant obtained for himself a three year continuance by being a fugitive and by keeping himself outside the continental limits of the United States, and in view of the series of attorneys with whom the defendant has consulted and who have been employed by him in this case, and in view of the fact that the defendant was given notice of this setting more than five weeks in advance, it is respectfully submitted that such motion should be denied.

/s/ GUILFORD L. JONES

GUILFORD L. JONES
District Attorney
118th Judicial District
Howard County, Texas

Sworn and subscribed to before me by the said Guilford L. Jones, this 1st day of December, 1960, to certify which witness my hand and seal of office.

/s/ WADE CHOATE

WADE CHOATE
District Clerk
Howard County, Texas

APPENDIX "B"

No. 3761

In Re:
STATE OF TEXAS
vs.
V. A. GOMEZ

In the District Court
118th District of Texas

I, R. W. Caton, District Judge for the 118th Judicial District of the State of Texas do certify that the following events occurred in connection with the trial of the State of Texas vs. V. A. Gomez, No. 3761 in said court, which trial commenced on December 5, 1960.

On the 18th day of July, 1960, the Honorable George T. Thomas, a practicing attorney residing in Big Spring, Texas, and a former County Attorney, appeared before the court in connection with setting of bond in Case No. 3395, being an indictment pending against defendant, V. A. Gomez.

On the 30th day of August, 1960, the Honorable Warren Burnett, a practicing attorney residing in Odessa, Texas, and a former District Attorney of the 70th Judicial District of Texas, and also the Honorable Wayne Basden, a practicing attorney of Big Spring, Texas, appeared before the court in connection with the setting of bonds in Cases Nos. 3759, 3760, 3761, and 3762, all being cases pending against defendant, V. A. Gomez. On this occasion Mr. Warren Burnett in particular indicated to the

court that he represented the defendant, V. A. Gomez, and would be ready for trial on these cases at an early setting. All of the above cases referred to are of similar nature.

On the 17th day of October, 1960, this court instructed the Honorable Guilford L. Jones, District Attorney for this judicial district, that the cases wherein V. A. Gomez was defendant, including No. 3961, would be set for trial on December 5, 1960, and this court directed the District Attorney to give proper notification of setting of said cases.

This court then received a letter dated November 1, 1960, from the Honorable Bernard A. Golding, a practicing attorney of Houston, Texas, stating therein that he represented Mr. V. A. Gomez, the defendant in the cases above mentioned. Mr. Golding was forthwith also advised as to the setting of said cases pending against V. A. Gomez.

On the 5th day of December, 1960, being the date the aforementioned cases were called for trial, the defendant, V. A. Gomez, entered the court room and seated himself at the table which is by custom known in this court as the "Defendant's Counsel Table." No attorney was seated with the defendant at such table in the court room. The defendant then offered his first motion for continuance as signed by the Honorable Bernard A. Golding. The Honorable Wayne Basden, attorney before mentioned, was present in the court room but seated at a different table. While the court was considering the defend-

ant's first motion for continuance, the Honorable Wayne Basden was observed by the court on two occasions to approach the defendant at the place where he was seated at his table and talk briefly with the defendant in a confidential manner. The court does not know the topic of these conversations between the Honorable Wayne Basden and the defendant, V. A. Gomez. After the court had overruled defendant's first and second motion for continuance, the court appointe dthe Honorable W. H. Eyssen, Jr., a practicing attorney of Big Spring, Texas, to represent the defendant, V. A. Gomez. At the time of the appointment of Mr. Eyssen, the court announced in open court, in the presence of the defendant, that such appointment of Attorney Eyssen was made under a theory of constitutional due process and was not made under the terms and provisions of Article 474, Code of Criminal Procedure of the State of Texas, the court then knowing generally the financial status of the defendant, and there being no showing or indication that the defendant was an indigent person. The court then heard, considered and overruled the motion made by the Honorable W. H. Eyssen, Jr., for ten days within which to prepare for trial under the provisions of Article 474, Code of Criminal Procedure of the State of Texas, as well as various other motions, all of which were duly considered by the court and overruled.

There is attached hereto and made a part hereof a copy of this court's docket sheet showing all entries made thereon and the date rulings were made by the court.

Done this 16th day of November, 1961 at Big Spring, Texas

/s/ R. W. CATON

R. W. CATON
District Judge
118th Judicial District of Texas

Date of Orders	ORDERS OF COURT CONTINUED	Minute Book Vol	Minute Book Page
	State offered evidence and rested. Defendant made motion for instructed verdict of acquittal which was refused by the court. Defendant offered no evidence and rested. Defendant moved for mistrial which was refused. Both parties closed. Charge prepared and objected to by defendant. Charge read to jury. Both parties argued. Jury retired at 6:30 PM. Jury returned verdict into open court. Verdict was read in open court and was received by court without objection to receipt of same. Judgment pronounced on defendant in open court. Defendant gave notice of appeal to Court of Criminal Appeals - Recognizance in this case set at $22.000.00. R. W. Caton, Judge		
12-12-60	Came the defendant in open court and withdrew notice of appeal heretofore made which was approved by court. Defendant requested to be sentenced on this day. Defendant was sentenced to State Penitentiary for a term of not less than two years nor more than seven years. Defendant gave notice of appeal to Court of Criminal Appeals. Defendant asked recognizance to be set by the court. Recognizance set at $22,000.00. Recognizance approved by court and V. A. Gomez, Truman Jones, Chon Rodriguez and J. M. Aleman placed under $22,000.00 recognizance in open court. R. W. Caton, Judge		

CRIMINAL DOCKET

Case No. 3761

Number of Case	STYLE OF CASE	ATTORNEYS	OFFENSE	DATE OF FILING MONTH	Day	Year
FEE BOOK Vol. Page	THE STATE OF TEXAS vs. V. A. Gomez	State. Defendant.	Receiving and Concealing and Theft	7	29	60
				Information or Indictment		

Date of Orders	ORDERS OF COURT	Minute Book Vol.	Minute Book Page	WITNESSES
8-30-60	Bond set on defendant at $6,000.00. R. W. Caton			
12-5-60	Came on to be heard the above case. Defendant offered motion for continuance which was struck on motion of state. Defendant requested time to make and file motion for continuance verified by himself which was granted. Motion for continuance made by himself personally refused by court. W. H. Eyssen, Jr. appointed as attorney for defendant under provisions of constitutional due process clause. Motion by defendant's attorney to be given 10 days time under Art. 494, C.C.P. refused. Defendant's motion to quash indictment overruled. Defendant's motion to consolidate causes overruled. Defendant's motion for change of venue overruled. Parties announced ready to proceed with selection of the jury. A jury was duly selected, seated and sworn. District Attorney read indictment. Defendant remained mute and court entered plea of not guilty for him. Rule as to exclusion of witnesses invoked by state.			